Editor's note: 92 I.D. 208.

BRUCE W. CRAWFORD ET UX.
(92 I.D. 208)

IBLA 83-851 Decided May 17, 1985

Appeal from a decision of the Oregon State Office, Bureau of Land Management, affirming issuance of a notice of noncompliance with respect to operations on certain placer mining claims. MN-OR110-049-82.

Set aside and remanded.

1. Mining Claims: Generally--Mining Claims: Surface Uses

   Where the locator of a mining claim has discovered a valuable mineral deposit within the limits of his claim, the locator is granted, pursuant to 30 U.S.C. § 26 (1982), the exclusive right of possession of the surface of the claim subject to the limitations of sec. 4(b) of the Surface Resources Act, 30 U.S.C. § 612(b) (1982), if applicable, and subject to the further limitation that such rights are restricted, until the purchase price is paid, to uses reasonably incident to actual mining.

2. Mining Claims: Generally--Mining Claims: Surface Uses

   Nothing in the general mining laws invests a locator with the right to initiate occupancy on a mining claim absent a showing that such occupancy is reasonably incident to mining activities.

3. Mining Claims: Generally--Mining Claims: Surface Uses

> Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his actual mining operations, prior to issuance of an order directing that occupancy cease.

4. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

> Under the regulations adopted by the Bureau of Land Management, the authorized officer has no authority to approve or disapprove the contents of a notice of intent to commence mining operations filed under 43 CFR 3809.1-3(a). Therefore, where an operator has failed to timely file pursuant to that section, a notice of noncompliance may be issued, but such notice is necessarily limited in scope to requiring the operator to submit a notice.

5. Federal Land Policy and Managemetn Act of 1976: Surface Management--Mining Claims: Surface Uses

> Pursuant to 43 CFR 3809.3-2(d), a notice of noncompliance properly issues upon a determination that a use to which a mining claim may properly be put is occurring in such a manner as to result in unnecessary or undue degradation of the land.

6. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Surface Uses

> While mining claimants are required to obtain all necessary state permits relating to mining activities, a notice of noncompliance based on the failure to obtain such permits can only be sustained where the authorized officer delineates exactly which permits were required and provides sufficient factual background to support this conclusion.

APPEARANCES: Richard F. Lancefield, Esq., Portland, Oregon, for appellants; Eugene A. Briggs, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Bruce and Lorri Crawford appeal from a decision of the Oregon State Office, Bureau of Land Management (BLM), dated June 29, 1983, affirming the issuance by the Medford District Manager of a notice of noncompliance with respect to activities being conducted on the Valentine and Hard Luck placer mining claims.

The claims in issue were located by appellants on November 20, 1981. On May 18, 1982, appellants filed a notice of intent to conduct mining operations, pursuant to 43 CFR 3809.1-3(a). 1/ In addition to generally describing the mining activities planned, appellants noted that they would be placing the following structures on the claim: "3 trailer houses, one chicken house, one smoke house, and tool shed 12' by 20'. All will be temporary." By letter of May 20, 1982, appellants were informed that their mining notice was in order and complete.

On November 19, 1982, a local sheriff's deputy informed BLM that a log cabin had been constructed on the Valentine claim. The next day, two BLM employees visited the claims. According to the written report of this investigation, they found a trailer and a 900-square-foot log cabin, the interior of which had not been completed. Additionally, there was a vegetable garden and some chickens present. When asked about the cabin, Lorri Crawford

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1/ Generally, where less than 5 acres is being disturbed in a single calendar year, a claimant is required to file a "notice" with BLM under 43 CFR 3809.1-3. Where either more than 5 acres is being disturbed or the operation involves land in certain designated areas, a "plan of operation" under 43 CFR 3809.1-4 must be filed.

stated that Wally Swanson, a BLM employee, had given them verbal authorization to build the house provided that it had a temporary foundation.

On January 10, 1983, the Medford District Manager issued a notice of noncompliance. This notice recited, inter alia, that appellants had constructed a residential frame building used for a primary domicile and had also constructed agricultural plots with associated fences and domestic animal pens. Additionally, the notice stated that appellants had failed to obtain a waste water permit and a fill and removal or mined land reclamation permit as required by the State of Oregon. The notice of noncompliance instructed appellants to begin corrective action within 30 days to remove the residential frame building, the agricultural plots and fences, and the domestic animals and associated holding pens and further required them to obtain all necessary permits.

On January 18, 1983, appellants submitted various documents as their calendar year 1983 notice, essentially amending their earlier notice of intent to mine. In this filing, they specifically referenced a log cabin with dimensions of 24 by 26 feet. In response, the District Manager, by letter of February 2, 1983, reiterated the demand that appellants remove the structures described in the notice of noncompliance, noting that if appellants failed to comply with the notice, the Bureau would, in accordance with 43 CFR 3809.3-2(e), require submission of a plan of operations and a bond to cover reclamation costs. The letter further noted that "under this requirement you would not be allowed to mine until you supplied a bond and the plan of operations was approved. BLM would not approve the plan of operations until you

comply with the notice of noncompliance." Appellants in the interim had appealed the notice of noncompliance to the State Director pursuant to 43 CFR 3809.4(a).

Various attempts were then made by BLM to settle the matter, primarily by offering appellants a 1-year residency permit to afford them an opportunity to find another site for the cabin. Of some importance, however, is a memorandum dated February 28, 1983, from the Acting Medford District Manager to the State Director. In this memorandum, the Acting District Manager noted:

> We would like to make it clear that at no time did we challenge the right of the Crawfords to mine or interfere with their mining operation. In our opinion, a trailer house currently on the claim was an adequate residence for the amount of mining that was on-going at that time. And further, it was our opinion that the garden plots and raising of chickens were not incidental to the use of a mining claim; therefore, the notice of noncompliance was issued. Again, we must reiterate that the mining operation or the occupancy in itself was not in question. The method of the occupancy and incidental uses of that occupancy were. [Emphasis supplied.]

Appellants ultimately declined to accept the temporary residence permit, and the State Director proceeded to consider their appeal.

In their appeal to the State Director, appellants had alleged that they had discussed the plans for their cabin with a BLM representative prior to constructing it and argued that it was a temporary structure without utilities that would be removed at the conclusion of mining activities. They argued that if their plans were not detailed enough they should have been told so when they were submitted, not 8 months later. While admitting they

had a vegetable garden and nine chickens, they contended that these uses were "necessities if one is to mine as much as possible." Insofar as the State permits were concerned, they argued that a check with the State agencies had shown that none of the permits were required for their present operations and that should any permits become necessary in the future, application would promptly be made.

In his decision affirming issuance of the notice of noncompliance, the State Director discussed the allegations of the claimants in two general categories, viz., compliance with the regulations in Subpart 3809 and nonapplicability of the State permitting requirements. Treating the latter issue first, the State Director reviewed the various factual allegations and concluded that "the weight of documentation tips sharply in favor of BLM's determination that appellants failed to obtain applicable State permits" (Decision at 6).

The State Director then turned to the question whether appellants had failed to comply with the requirements of 43 CFR Subpart 3809. The State Director stated that, in fact, all of appellants' improvements were placed on the land before notice was provided to BLM, since the original notice merely described improvements already in place at that time. The State Director continued:

> The failure of appellants to provide a timely and complete notice of mining operations to BLM constitutes a serious infraction which cuts at the very heart of the surface mining management regulations. Neither of appellants' notices were sufficient to

> provide the kind of notification required to enable BLM to pursue its statutory mandate to manage and protect surface resources on federal lands. The appeal regarding this issue is also denied and the decision appealed from is affirmed in its entirety.

Appellants timely pursued this appeal to the Board.

In their statement of reasons in support of the appeal, appellants argue variously that the decision of the State Director was beyond his authority and that it violated due process safeguards inasmuch as it was issued without notice or an opportunity for hearing. Appellants admit they may have erred in failing to formally notify BLM prior to placing the cabin on their claim. They argue that it is needed to facilitate mining on their claim during the winter. 2/ They state that they had not unduly degraded the land and that the State Director's decision was unreasonable, arbitrary, and capricious.

In response, counsel for BLM first argues that the authorized officer has authority to disapprove a notice of intent to mine and issue a notice of noncompliance demanding cessation of an illegal use of public land, even though effective enforcement of such a decision might only be obtained pursuant to Federal court action. Counsel further asserts that the order "is based upon a conclusion that the Crawfords are occupying the mining claims for the purpose of having a residence, rather than for mining purposes" (Answer at 6). Counsel continues:

2/ Appellants point out that, under Oregon law, placer mining on tributaries of the Rogue River is limited to between Nov. 15 and Apr. 15.

> The BLM investigation shows that the Crawford claims are only 800 feet from Peavine Road, an all-weather road, and only four miles from Galice Creek Road, which has all utilities, is paved, and has many year-round occupants. It is 5.6 miles from the claims to Galice, a small resort community which has a grocery store, cafe and gasoline station, and 15 miles to Merlin (not 25 as stated in Exhibit B.). There is rarely snow in this area, and there is no need to occupy the claim for the purpose of working it in the casual, part-time manner used by the Crawfords. Rather, the only reason to occupy the claims is to avoid having to establish occupancy elsewhere.
>
> These claims can be reached without incident on almost any day of any year. Appellants' complaints of the discomfort of occupancy of a trailer house on the claims apply to any occupancy of such a trailer house in western Oregon during the winter.
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> * * * * * * *
>
> Picking bits of gold out of sand, "using tweezers and even a tooth pick," (Exhibit B, page 2) is not the type of mining operation which requires occupancy of the mining claim. Portable equipment which can be moved daily does not justify occupancy of a claim.

Id.

Appellants filed a response to the BLM answer reiterating their original contentions and generally arguing that counsel for BLM was merely adding his conjecture as to why the State Director acted without any basis in the record upon which to support these surmises. Because, as we shall subsequently show, the decision of the District Manager, the decision of the State Director, and the brief filed on BLM's behalf, all embrace differing theories as to the basis for prohibition of occupancy on the claim, some confusion is inevitable in our discussion of the issues involved. At this point in our discussion, it is sufficient to merely advert to the existence of these differing theories. They will be fleshed out in greater detail subsequently in the text.

[1] Before discussing the specific issues raised in this appeal, which will require a lengthy exegesis on the present regulatory scheme, it will be helpful to briefly explore the statutory framework under which the regulations have been promulgated. Under the 1872 Mining Act, the location of a mining claim invested the locator with certain rights. Prior to a discovery of a valuable mineral deposit, and provided that the locator continued in a diligent search for minerals, the locator was possessed of rights generally described as pedis possessio. Such a claimant was protected against subsequent intrusions of others while he remained in continuous, exclusive occupancy and diligently attempted to make a discovery. See generally Union Oil Company of California v. Smith, 249 U.S. 337 (1919). 3/ The protections afforded by the doctrine of pedis possessio, however, did not apply as against the United States. Thus, should the Government withdraw the land from mineral entry prior to a discovery, all of the claimant's possessory rights were thereby terminated. Cameron v. United States, 252 U.S. 450, 456 (1920); United States v. Williamson, 45 IBLA 264, 277-78, 87 I.D. 34, 41-42 (1980); R. Gail Tibbetts, 43 IBLA 210, 218-19, 86 I.D. 538, 542-43 (1979).

On the other hand, where a discovery was made within the limits of a valid location, the rights of the claimant progressed from a mere right of possession while continuing in a diligent search for minerals to "property in the fullest sense of the word." Forbes v. Gracey, 94 U.S. 762, 767 (1877).

3/ As the Supreme Court noted in Cole v. Ralph, 252 U.S. 286 (1920), however, this protection applied only against a "forcible, fraudulent or clandestine intrusion," and a peaceable, open entry by another, if perfected by a discovery, would defease the original claimant of his possessory title. Id. at 295. See also Belk v. Meagher, 104 U.S. 279 (1881).

So long as such a claim is maintained in conformity with the law, it is good as against the United States. See, e.g., Davis v. Nelson, 329 F.2d 840, 845 (9th Cir. 1964).

Under the express provisions of the 1872 Mining Law, where a valid location, i.e., one supported by a discovery, has been made, the locator is granted "the exclusive right of possession and enjoyment of all the surface included within the lines of [the] location." 30 U.S.C. § 26 (1982). 4/ It is of some note that in the period of time between the adoption of the 1872 Act until the Surface Resources Act in 1955, 30 U.S.C. §§ 601-612 (1982), only a handful of Federal cases dealt with the scope of this grant. One, Teller v. United States, 113 F. 273 (8th Cir. 1901), involved the cutting of timber on an unpatented mining claim. Another, United States v. Rizzinelli, 182 F. 675 (D. Idaho 1910), involved the maintenance of a saloon on an unpatented mining claim located within the Coeur d'Alene National Forest. Both courts reached the same conclusion as to the scope of the grant of "exclusive possession" following similar lines of reasoning.

The court in Teller reiterated the United States Supreme Court's classification of the titles created by the mining laws of the United States: (1) title by possession, (2) the complete equitable title, and

4/ It is important to distinguish this "exclusive right of possession" from the possessory right afforded by the doctrine of pedis possessio. As noted above, the latter right does not apply as against the United States. The former, however, at least insofar as the located mineral estate is concerned, is applicable against the Government. See generally United States v. Etcheverry, 230 F.2d 193, 195-96 (10th Cir. 1956); Teller v. United States, 113 F. 273, 280-81 (8th Cir. 1901). The extent of this grant of exclusive possession is explored, infra, in the text.

(3) title in fee simple. 5/ Title by possession, flowing from location and discovery, conferred the right to work the claim for its minerals, but, said the court, conferred "no right to take timber, or otherwise make use of the surface of the claim, except so far as it may be reasonably necessary in the legitimate operation of mining." Id. at 280. The court continued, noting that while the location of a valid claim afforded the claimant the present and exclusive possession for mining purposes, "[i]t did not devest the legal title of the United States, or impair its right to protect the land and its product * * * from trespass or waste." Id. at 281.

A major consideration in the court's conclusion that, prior to the vesting of equitable title (which would occur upon the filing of the patent application and the payment of the purchase price), there was no right to denude land within a mining claim of its standing timber for purposes other than those directly related to mining activity, was recognition that while Congress had granted the right to remove minerals from the public domain as a gratuity it had also determined to divest the Government of title to the surface estate only upon payment of the purchase price for the land. 6/ Allowing such depredatory actions as clearcutting of timber unassociated with the mining activities prior to the tender of the purchase price would permit

5/ The court was quoting the Supreme Court's decision in Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 (1892), which, in turn, had cited with approval an earlier decision of the Secretary of the Interior. Id. at 430.

6/ While the present purchase price for mining claims ($ 2.50 an acre for placer claims and $ 5 an acre for lode claims) may seem, under modern economics, to be not much more than a gratuitous payment, it must be remembered that, at the time the 1872 Act was adopted, these prices represented the going-rate for Government land. Thus, the 1862 Homestead Act provided for the purchase of agricultural lands upon the payment of $ 1.25 or $2.50 an acre. See 12 Stat. 392.

a mining claimant to obtain the advantages of full title without ever paying the price Congress had established as a prerequisite to the grant of fee title.

In United States v. Rizzinelli, supra, which involved the establishment of saloons on unpatented mining claims, the district court first rejected appellants' contention that the location of a mining claim removed the land within the claim from the administrative jurisdiction of the Secretary of Agriculture such that certain rules which the Secretary had issued were ineffective as to the claims. The court noted that the act of June 4, 1897, 30 Stat. 36, which had established the Forest Reserves (predecessors of the National Forests) had expressly provided that they were open to the location and development of mining claims, "Provided, That such persons comply with the rules and regulations, covering such forest reservations." See 16 U.S.C. § 478 (1982). Thus, the court held appellants' claim was subject to the administrative jurisdiction of the Secretary of Agriculture.

More important for our purposes, the court also essentially accepted the Government's argument that the holder of an unpatented mining claim was possessed of the exclusive use of the surface of the claim "only for purposes connected with or incident to the exploration and recovery of the mineral therein contained." Id. at 681. The court reached its conclusion through reasoning similar to that employed in Teller:

> At the same time the government confers upon the locator the right to possess and enjoy the surface of a mining claim for mining purposes without the payment of any consideration therefor, it offers for a small consideration to convey to him the

> entire estate. The government gives the mineral to him who finds it, and, for purposes incident to the extraction thereof, permits him to possess and use the ground in which it is found. It does not give him the ground, but empowers him to purchase it, and that he may do if he desires its permanent and unrestricted use.

Id. at 682-83.

Such was the state of the law at the time that Congress adopted the Surface Resources Act in 1955. See Act of July 23, 1955, 69 Stat. 367, as amended, 30 U.S.C. §§ 601-615 (1982). This multifaceted Act found its genesis primarily in the growing recognition that more and more claims were being located merely as a subterfuge to invest the locator with colorable rights to the surface resources, particularly timber. See H. Rep. No. 730, 84th Corg., 1st Sess., reprinted in 1955 U.S. Code Cong. & Ad. News at 2478. More generally, the locations of claims in forests obstructed access to adjacent tracts of Federal land containing merchantable timber or valuable recreation sites and led to greatly increased administrative costs. Additionally, Congress noted that "[s]ame locators in reality, desire their mining claims for commercial enterprises such as filling stations, curio shops, cafes, or for residence or summer camp purposes." Id. at 2479. 7/

7/ It should be pointed out that a generalized opposition to occupancy within the National Forests and on public land was not the driving force behind congressional concern on this point. Congressional objections actually related to the amount of acreage being embraced in mining claims which were merely a legal guise to establish residency, and not with residency, per se. Thus, the Committee Report, after making the statement, quoted in the text, continued:

> "If application is made for residence or summer camp purposes under Federal law other than the mining laws, sites usually embrace small tracts, that is, 5-acre tracts; on the other hand, mining locations provide for control and utilization of approximately 20-acre tracts. Fraudulent locators prefer 20 acres to 5 acres."

Id.

In framing a response to these growing abuses, Congress noted:

> There is, however, agreement that any corrective legislation providing for multiple use of the surface of the same tracts of public lands, compatible with unhampered subsurface resource development, must be aimed at --
>
> First, prohibiting location of mining claims for any purpose other than prospecting, mining, processing, and related activities;
>
> Second, providing for conservation and utilization of timber, forage, and other surface resources on mining claims, and on adjacent lands; and
>
> Third, accomplishing these desirable ends without materially changing the basic concepts and principles of the general mining laws.

Id. at 2480. It was with these three considerations in mind that Congress enacted the Surface Resources Act.

Congress attempted to correct the situation by pursuing a variety of different tacks. Thus, Congress removed from location common varieties of sand, stone, gravel, pumice, and cinders, and made them subject to purchase under the Material Sales Act of 1947, 61 Stat. 681, as amended, 30 U.S.C. §§ 601-604 (1982). More germane to our purposes was section 4 of the 1955 Act, 30 U.S.C. § 612 (1982).

Section 4(a) of the Act provided that "[a]ny mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto." Section 4(b) of the Act provided that all claims thereafter located would be

subject, prior to the issuance of a patent, to the right of the United States to manage and dispose of vegetative surface resources and to manage other surface resources (exempting mineral resources subject to location) and granted the United States and its licensees and permittees the right to use so much of the surface as was necessary for such management and disposal purposes as well as for access to adjacent land. These rights were, however, limited by the following express caveat: "[A]ny use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing or uses reasonably incident thereto." Section 4(c) expressly prohibited the severing or removal of vegetative or surface resources on any unpatented mining claim located after the Act "[e]xcept to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto."

It can be seen from the foregoing that sections 4(a) and 4(c), far from altering the surface rights obtained by the location of a mining claim were, in fact, simply declaratory of the law as it existed prior to 1955. 8/ Section 4(b), on the other hand, effected a substantial change in the surface management of claims located subsequent thereto, or made subject thereto

8/ This point was expressly made in the Public Land Law Review Commission Report (PLLRC), Legal Study of the Nonfuel Mineral Resources. Thus, the PLLRC Report noted with reference to section 4(a), "[a]lthough some members of Congress appear to have been under the impression that this section was an amendment of the mining laws, it is merely a codification of the judicial and administrative interpretation of those laws." PLLRC Report at 992. See also United States v. Springer, 321 F. Supp. 625, 627 (C.D. Cal. 1970). "Prior to 1955 it would seem clear that a mining claimant could not use the claim for any purposes other than mining purposes and uses reasonably incident to mining * * *."

pursuant to the procedures provided by section 5. 9/ Thus, while Teller v. United States, supra, had established the principle that the owner of an unpatented mining claim had no right to cut timber found on the claim for purposes unrelated to mining, the decision of the Idaho District Court in United States v. Deasy, 24 F.2d 108 (1928), had similarly established the rule that the United States had no right to cut such timber and retain the proceeds. Subsequent to this decision, the Forest Service discontinued its practice of selling timber on unpatented mining claims. The Department of the Interior similarly expressed the view that it was without authority to sell such timber. 10/ See Authority of the Bureau of Land Management to Sell Timber on an Unpatented Mining Claim, M-36265 (Mar. 11, 1955). Effectively, therefore, no one could manage or dispose of such timber so long as it remained within an unpatented mining claim. Section 4(b) remedied this situation by vesting such authority in the United States.

Insofar as access across unpatented mining claims was concerned, the exclusive possession of the surface afforded by 30 U.S.C. § 26 (1982) had been deemed to preclude access rights across an unpatented mining claim

9/ Section 5 of the Act, 30 U.S.C. § 613 (1982), established a procedure for verifying whether a pre-1955 claim was, at the time the Act was adopted, supported by a discovery of a valuable mineral deposit. Where it was established that a claim was not so supported, that claim was made subject to the surface management provisions of section 4 of the Act.

10/ This rule did not apply to claims in Oregon and California Railroad revested grant lands located after Aug. 28, 1937, where, by statute, no possessory title to the timber was acquired by the location of a mining claim. See Act of April 8, 1948, 62 Stat. 162. Nor did it apply to salvage operations designed to remove diseased or insect-infested timber. See Bradley-Turner Mines, Inc. v. Branagh, 187 F. Supp. 665 (N.D. Cal. 1960), aff'd, 294 F.2d 954 (9th Cir. 1961); Lewis v. Garlock, 168 F. 153 (C.C.S.D. 1909).

absent the claimant's consent. See generally Access Road Construction, 65 I.D. 200 (1958). Section 4(b) of the Act also altered this principle on claims subject to it.

While there has been some confusion in judicial decisions as to whether section 4(a) worked to limit permissible uses of the surface of mining claims located after 1955 vis-a-vis those rights appurtenant to pre-1955 claims, courts have, in actual practice, generally recognized that the same standard applied. See, e.g., United States v. Etcheverry, 230 F.2d 193 (10th Cir. 1956); United States v. Langley, 587 F. Supp. 1258 (E.D. Cal. 1984). One notable exception to this general rule is the Ninth Circuit's decision in United States v. Richardson, 599 F.2d 290 (1979).

The decision in Richardson involved a question not previously addressed in reported decisions, viz., whether the Government had the right to control the method of mining on the theory that the method utilized was not reasonable given the facts of the case. The Ninth Circuit drew a sharp dichotomy between claims subject to the Surface Resources Act and those not subject by expressly noting that "[t]he Surface Resources Act * * * must be relied upon to uphold the decree of the District Court in the present case." Id. at 293. In interpreting section 4 of the Surface Resources Act, the court, in effect, construed the surface management provisions of section 4(b) as modifying the declaratory language of section 4(a) resulting in the conclusion that post-1955 claims were subject to limitations in the methods of mining not necessarily applicable to pre-1955 claims.

The general approach of the Richardson court has been subject to some criticism. Thus, it has been noted: "If applied literally, the Richardson case would change the basic purpose of the Multiple Surface Use Act from regulation of activities which are not authorized by the General Mining Law to regulation of activities which are authorized by the General Mining Law, and would permit the United States to substitute its judgment concerning appropriate methods of exploration for the judgment of the prospector." See W. Marsh and D. Sherwood, "Metamorphosis in Mining Law: Federal Legislative and Regulatory Amendment and Supplementation of the General Mining Law Since 1955," 26 Rocky Mtn. Min. L. Inst. 209, 228 (1980).

Implicit in this criticism, however, is both the view that no change was intended by Congress concerning the "exclusive right of possession" afforded a claimant by reason of his valid location 11/ and the supposition that the authority of the Government to regulate the mode of mining was nonexistent prior to the adoption of the Surface Resources Act. While we consider the former proposition to be relatively established, 12/ the latter

11/ Quite apart from its questionable assertion that the Surface Resources Act effected a change in the "exclusive possession" afforded valid locations, the Richardson court is also subject to the criticism that, since the claim involved was clearly held to be invalid (Id. at 295), the issue before the Court was not one concerning the scope of 30 U.S.C. § 26 (1982) but of the rights of pedis possessio. See discussion note 4, supra; R. Sager, "Exclusive Possession of Unpatented Mining Claims: Fact or Fiction?" 17 Rocky Mtn. Min. L. Inst. 301-23 (1972).

12/ Paradoxically, it must be noted that section 4(a) of the Surface Resources Act, supra, directly speaks to "prospecting," a term generally applicable only prior to a discovery. But, to the same extent that section 4(a) is correctly seen as merely a restatement of the law as it then existed, one cannot read this addition as expanding the ambit of 30 U.S.C. § 26 (1982) to include claims not supported by a discovery. Rather, the inclusion of the term "prospecting" must be read merely to restate the general proposition that a prospector does not possess any right to use the surface of his or her claim for purposes other than those reasonably incident to prospecting activities.

premise is essentially based on the absence of cases expressly asserting the authority to regulate mining within a valid claim. We do not believe, however, that the fact there are no cases establishing this authority can be accorded the status of a conclusive holding that such authority did not exist, particularly where there are no cases expressly denying the existence of such authority.

Moreover, in a somewhat analogous area of the mining law, two court decisions indicate that the rights appurtenant to a mining claim may not embrace the right to mine howsomever the claimant desires. Under the Stock-Raising Homestead Act of 1916, 39 Stat. 862, as amended, 43 U.S.C. §§ 291-302 (1982), all entries and patents were subject to a reservation of coal and other minerals. Locatable minerals remained subject to the mining laws. It was expressly provided in section 9 of the Act that "[a]ny person who has acquired * * * the right to mine and remove the [mineral deposits] may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to * * * mining or removal" provided the individual either first secured the written consent of the entryman or patentee or made payment for the damages to the crops or other tangible improvements thereof (and to the value of the lands for grazing purposes 13/) or, failing in both of the first two options, upon submission of a sufficient bond.

A similar law had been enacted 2 years earlier, in an attempt to permit agricultural entry on lands which had been withdrawn by President Taft

13/ This provision was added by the Act of June 21, 1949. See 30 U.S.C. § 54 (1982).

because of their value for oil and gas. 14/ This Act, commonly referred to as the Agricultural Entry Act of 1914, Act of July 17, 1914, 38 Stat. 509, as amended, 30 U.S.C. §§ 121-123 (1982), provided for the location and entry of such lands under the agricultural laws subject to a reservation of the minerals, for which it had been withdrawn by the United States. Section 2 of this Act afforded any person who had acquired from the United States the right to mine and remove the deposits the correlative right to "reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of minerals therefrom." Here, too, Congress provided for either the payment of damages or the posting of a bond to cover "damages caused thereby." Practically speaking, the adoption of the Mineral Leasing Act of 1920, which withdrew from location the minerals reserved under the Agricultural Entry Act, served to make such reserved minerals subject only to leasing; but, as will be seen, the principles which can be derived from certain cases construing this Act are equally applicable to the Stock-Raising Homestead Act and, by analogy, to mining claims located on the public domain.

The seminal case interpreting the scope of the protections afforded to the surface patentee was the Supreme Court's decision in Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928). This case involved a suit brought by Kinney-Coastal Oil Company (Kinney), the lessee of the United States, against one Michael F. Kieffer, who had obtained a homestead patent under the Agricultural Entry Act. Kinney's lease had originally issued pursuant to

14/ See generally L. Mall, "Federal Mineral Reservations," 10 Land & Water L. Rev. 1-61 (1975).

competitive bidding in 1921. While Kieffer's application to enter preceded the lease, patent did not issue until October 12, 1923, by which time Kinney had already completed a producing well. Soon thereafter, Kieffer, who, prior to patent, had only constructed a residence and various outbuildings, commenced to plat a townsite and sell individual lots upon which were quickly erected buildings for residential and other purposes. Kinney thereupon brought suit to stop the sale of lots and the platting of additional lands and to enforce its right to use "all of the surface" of the lands in question, which it contended was necessary to remove the leased minerals. While the court of appeals had concurred in the finding that Kinney would, indeed, need all of the surface, it ordered dismissal of the bill as it concluded appellant's remedies were at law rather than in equity and thus Kieffer had a constitutional right to a jury trial which had been abridged.

While the Supreme Court ultimately reversed this holding for reasons which need not detain us, certain discussions of the Court are of relevance to our immediate inquiry. In reviewing the ambit of compensable damages, the Court construed the statutory language as providing for compensation solely for crops and agricultural improvements. Id. at 505. Thus, damage to the surface estate itself was not directly compensable. However, the Court continued: "It well may be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor. But such liability will ensue, not from admissible mining operations and use of the surface, but from the inadmissible negligence causing the damage." Id. In Holbrook v. Continental Oil Co., 278 P.2d

798, 804 (Wyo. 1955), which involved both the Agricultural Entry Act and the Stock-Raising Homestead Act, the Supreme Court of Wyoming reiterated this point: "In the absence of proof of negligent mining operations * * * the surface owners * * * can recover only for damages to agricultural improvements or agricultural crops." Determination of what constitutes "negligence," however, of necessity would encompass consideration of what modes of mining were appropriate in the circumstances.

Admittedly, the analogy herein is subject to the criticism that, unlike the situation of a mining claim on the public domain, location of a claim on such patented land did not afford the "exclusive right of possession" of the surface to the mining claimant. While this is true, it must also be pointed out that in the American legal scheme the mineral estate has generally been denoted as the dominant estate (see generally J. Lacy, "Conflicting Surface Interests: Shotgun Diplomacy Revisited," 22 Rocky Mt. Min. Law Inst. 731 (1976)), and those who received patents subject to the mineral reservations were aware that the surface estate was subject to temporary appropriation by the owner of the mineral estate for purposes "reasonably incident" to mining and processing. This "reasonably incident" standard is, of course, the exact standard formulated by the Federal courts in declaiming on the extent of the rights afforded by the grant of "exclusive possession" to the holder of a valid mining claim prior to the adoption of the Surface Resources Act.

Moreover, if it were true that the Department possessed no power to control the method of mining prior to 1955, it is difficult to see how the Department could prevent depredations to timber resources where a miner

argued that clear cutting the land was merely incident to open pit mining. Yet, the Court in Teller v. United States, supra, prohibited the taking of timber, save what was necessary "in the legitimate operation of mining." Id. at 280 (emphasis supplied.) Determination of what is a "legitimate" operation necessarily entails consideration of whether the surface uses of the land, including the mode of extraction, are consistent with the recovery of the mineral deposit then shown to exist. Clearly, caution must be exercised in such judgments, lest the Government effectively preclude the valid exercise of the rights it has granted under the mining laws. But, by the same token, the Government need not stand idly by as land is despoiled and other values injured merely because a mining claimant baldly asserts that removal of a mineral deposit necessitates the destruction or use to which the Government objects.

[2] This extended discussion has been necessary because the question presented by this case actually embraces two related but independent considerations. The first issue involves the extent to which the Department can regulate or prohibit surface uses of a valid claim, including, as now alleged here, residential occupancy. Subsumed in this issue is the subsidiary question of the proper procedure to be followed in determining whether a use is permissible under the mining laws. The second issue concerns compliance with the Department's regulations and the appropriate penalty for the failure to comply. Included in this latter issue is the question of the scope of authority granted to BLM officials under the present regulatory scheme. We will deal with these discrete considerations seriatim.

As our above discussion indicates, while the Surface Resources Act clearly granted the Government expanded authority to manage surface resources and utilize the surface of an unpatented mining claim to obtain access to other Federal lands, it did not restrict the permissible uses of the surface by a mining claimant beyond those limitations which had theretofore been established by judicial exposition. Thus, the initial question is what types of uses are permitted and in what circumstances.

It is obvious that a vast number of uses to which land within a mining claim might be put have never been cognizable under the mining laws. There can be little question that beyond the saloons proscribed in United States v. Rizzinelli, supra, a number of the uses expressly referenced in the legislative history of the Surface Resources Act, were, as a matter of law, never countenanced as uses reasonably incident to mining. Among these would be use of the surface for filling stations, curio shops, cafes, and other commercial enterprises. 15/ Occupancy of a claim, however, requires careful treatment. For, while it may be that the mining laws never countenanced the location of claims as a subterfuge for acquiring a place to live (see United States v. Allen, 578 F.2d 236 (9th Cir. 1978)), it is equally beyond peradventure that occupancy of land incident to mining has never been interdicted. 16/

15/ Some of these clearly improper uses are set forth at 43 CFR 3712.1(b) and include, in addition to the uses set forth in the text, "tourist, or fishing and hunting camps." We note that this section, by its terms, only applies to claims subject to the Surface Resources Act. But, it can scarcely be contravened that all of the uses listed are proscribed on all unpatented mining claims regardless of the date of location. The regulation, thus, misapprehends the nature of section 4(a) of the Surface Resources Act, treating it as a new limitation on claims rather than a statutory codification of decisional law.

16/ For purposes of clarity in the discussion on this issue, the term "residential occupancy" will be used to denote occupancy not reasonably associated

In point of fact, as far back as 1886, the Department recognized that a valid millsite claim could embrace land containing houses for the miner's workmen. See Charles Lennig, 5 L.D. 190, 192 (1886). More recently, in Swanson v. Andrus, Civil No. 78-4145 (June 3, 1982), the United States District Court for Idaho partially reversed a decision of this Board which had held various millsites invalid, noting that "no consideration was given to a provision made for living quarters, offices, etc., clearly proper uses for mill site claims" (Opinion at 5). It would stand logic on its head to conclude that occupation of a mining claim is a per se violation of the limitation on pre-patent use of a claim to activities reasonably incident to mining, while at the same time to permit the appropriation of additional acreage for the same use. 17/

In United States v. Nogueira, 403 F.2d 816 (9th Cir. 1968), the court, after referring to section 4(a) of the Surface Resources Act, noted that "[c]ertainly permanent residence of the possessor not reasonably related to prospecting, mining or processing operations is not within the uses described." Id. at 825. But, as the district court in United States v. Langley, supra, noted, the "necessary corollary" of this holding is that "residence which is reasonably related to mining is permissible." Id. at 1263 (emphasis in original). The fact of occupancy, absent a showing that

fn. 16 (continued)
with mining activities while the term "occupancy" will be used to describe the situation where a miner is living on the land in conjunction with his or her mining activities.
17/ See R. Sager, supra, n.11 at 321.

the occupancy is not reasonably incident to mining, cannot, ipso facto, establish that a prohibited use has occurred.

Thus, in the instant case, the mere fact that appellants reside on their claim cannot, as a matter of law, establish they are in violation of any statutory prohibition, though, as a matter of fact, they may be if their occupancy is not reasonably incident to their mining activities. The latter determination, however, necessarily requires that we scrutinize appellants' occupancy in light of their mining operations.

[3] While it can be admitted that situations may arise, such as in the absence of any mining activities, 18/ where the determination of whether occupancy of the claim is reasonably incident to mining can be made on a record developed without the benefit of a fact-finding hearing, it is impossible to make such a determination in the instant case. Not only have appellants alleged substantial mining which they insist requires occupancy of the claim, but the record also contains, as we noted above, the statement of the Acting District Manager that "the occupancy in itself was not in question. The method of the occupancy and incidental uses of that occupancy were." Certainly, this statement of the Acting District Manager is not preclusive of a change in position by BLM. But is equally clear that the record gives

18/ The exclusive right of possession afforded by 30 U.S.C. § 26 (1982) is limited to uses reasonably incident to actual mining. Thus, where there is no actual mining or related activities occurring there is no right to use the surface. Appellants' Reply Brief misses the point when it asserts that it is immaterial how much time they actually mine, that the only requirement is the annual performance of assessment work. These considerations relate to the claim's ultimate validity not to permissible uses under 30 U.S.C. § 26 (1982).

rise to substantial fact questions concerning the nature of appellants' occupancy. 19/

The Department and the judiciary have long recognized that since a mining claim is a claim to property, due process requires that claimants be afforded notice and an opportunity for a hearing before a declaration is made that the claim is null and void for want of a discovery of a valuable mineral deposit. See Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958), United States v. O'Leary, 63 I.D. 341 (1956). While, in the instant case, the Department eschews any challenge to the validity of appellants' claims, it is clear that, if appellants are correct and occupancy of the claims is necessary in order to develop the mineral deposits allegedly located, the effect of an order requiring appellants to cease occupancy is tantamount to a taking of their right to mine. We find no difficulty in concluding that, to the extent to which BLM's actions may be predicated on the statutory limitation that allowable surface uses of unpatented mining claims are only those reasonably incident to mining, a decision ordering the cessation or limitation of occupancy in the instant case may only be entered after notice and an opportunity for hearing. Cf. United States v. Nogueira, supra at 825. In the absence of such an opportunity for a hearing, a decision premised on the conclusion that all occupancy should be proscribed could not be sustained.

19/ Thus, even if it be granted that some occupancy of the claim is reasonably incident to appellants' mining, this would not establish that they need three trailers or chicken houses. The right to occupy does not necessarily embrace the right to live in the style one might desire if he or she owned the land in fee. This question, however, as we explain infra, is properly considered in determining whether there is unnecessary or undue degradation.

[4] This, however, does not end the matter. Independent of the statutory limitations of surface uses of mining claims is the question whether appellants have complied with the Department's regulations and, if not, what penalty is properly invoked for their failure. That these considerations are independent of the statutory limitations was clearly established by the district court's decision in United States v. Langley, supra. That case involved, inter alia, residency on a mining claim situated within the Shasta-Trinity National Forest.

In Langley, the court first noted that, insofar as the statutory limitation was concerned, "the government has not produced sufficient evidence in the first instance to meet its burden of showing as a matter of law that [the mining claimant's] residence is not reasonably related to mining or attendant operations." Id. at 1263. The court then turned to the question of whether the claimant's occupancy comported with the applicable Forest Service regulations. Because these regulations not only served as the impetus for the adoption of similar regulations by BLM but also because these regulations differ from those ultimately promulgated by BLM in significant ways, it is helpful to briefly describe the Forest Service regulatory scheme.

The Forest Service regulations are now found at 36 CFR Part 228. 20/ As noted in the regulations, their intended purpose is to minimize adverse

20/ They were originally located at 36 CFR Part 252. They were redesignated as Part 228 on July 14, 1981, 46 FR 36142. While there were no substantial changes, a number of the earlier court decisions necessarily referenced the prior designation numbers in discussing the effect of these regulations.

environmental impacts on national forest system surface resources by activities expressly authorized under the mining laws. In brief, the Forest Service regulatory scheme works as follows. Either of two separate documents may be required to be filed: (1) a notice of intent to operate or (2) a plan of operations. However, the Forest Service has established five situations in which neither a notice of intent nor a plan of operations need be filed. Thus, the requirement to submit these documents does not apply:

> (i) To operations which will be limited to the use of vehicles on existing public roads used and maintained for National Forest purposes, (ii) to individuals desiring to search for and occasionally remove small mineral samples or specimens, (iii) to prospecting and sampling which will not cause significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study, (iv) to marking and monumenting a mining claim and (v) to subsurface operations which will not cause significant surface resource disturbance.

36 CFR 228.4(a)(1). 21/ In all other cases, operators must, at a minimum, file a notice of intent to operate.

Under the regulations, a notice of intent to operate must be filed with the District Ranger and must "provide information sufficient to identify the

21/ It should be noted that an additional exception, at least insofar as the requirement that a notice of intent be filed, is made for operations "which will not involve the use of mechanized earthmoving equipment such as bulldozers or backhoes and will not involve the cutting of trees." 36 CFR 228.4(a)(2)(iii). However, unlike the activities listed in the text which are expressly exempted from the filing of a plan of operations as well as a notice of intent to operate, this additional activity is not precluded from the possible contingency that a plan of operations might be required. But since, as is explained infra in the text, it is the filing of the notice of intent which will normally trigger a determination by the Forest Service that a plan of operations is required, it is unclear what mechanism other than the issuance of a notice of noncompliance (36 CFR 252.7(b)) would trigger the requirement that a plan of operations be filed.

area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport." 36 CFR 228.4(a)(2). If the District Ranger determines that such operations "will likely cause significant disturbance of surface resources, the operator shall submit a proposed plan of operations." 36 CFR 228.4(a). Under the regulations, the District Manager must notify the operator whether a plan of operations is required within 15 days of receipt of the notice of intent to operate. 22/

A plan of operations is a considerably more detailed and formal document. See 36 CFR 228.4(c). An operator may not commence operations prior to receipt of plan approval. While the regulations direct that the District Ranger analyze the plan within 30 days (36 CFR 228.5(a)), various contingencies may occur which would serve to postpone the ultimate determination as to the plan's acceptability. See 36 CFR 228.5(a)(4) and (a)(5). Pending actual approval of the plan, only those activities necessary for timely compliance with Federal and state laws, e.g., performance of assessment work, will be approved by the District Ranger.

As noted earlier, the decision in United States v. Langley, supra, involved occupancy of a mining claim in the Shasta-Trinity National Forest. This occupancy was of a long-standing nature for which appellants had filed neither a notice of intent to operate nor a plan of operations. Finally, after repeated requests by the Forest Service, the operator filed a notice of intent to operate. On November 4, 1982, the Forest Service notified the

22/ It should be noted that where an operator believes that a plan of operations would be required, he need not first file a notice of intent, but rather may elect to file a plan of operations as an initial matter.

claimant that his present and proposed operations were likely to cause a significant surface disturbance and he was accordingly directed to file a plan of operations. The operator, one Charles R. Gamble, 23/ was expressly advised that in order to obtain authorization for his occupancy, he would be required to show that it was reasonably necessary to the proposed mining activities.

On April 1, 1983, Gamble submitted a one-page document asserting that no surface resources would be disturbed and that the condition of his occupancy would be the same as in the past. The Forest Service found this filing inadequate and requested Gamble to supply a substantial amount of additional information. Gamble made no further submissions, though he continued in his occupancy.

In enjoining Gamble from further occupancy of the claim until such time as the Forest Service had approved his plan of operations, 24/ the court expressly held, as a matter of law, that "the maintenance of a fixed residence by defendant creates a sufficiently significant surface disturbance as to require an approved Plan of Operations pursuant to 36 CFR 228." Id. at 1266. It seems clear that, were the same regulations applicable to appellants' claims in this appeal, an order requiring them to vacate the premises would properly issue, since no approved plan of operations covers their

23/ In Langley, litigation had actually commenced in 1975 as a suit in ejectment seeking to oust Gamble's predecessors-in-interest. Gamble acquired the claim in 1977, and was accordingly substituted as the defendant in the action.

24/ Accord, United States v. Smith Christian Mining Enterprises, 537 F. Supp. 57, 64-65 (D. Ore. 1981).

activities. The problem, however, is that the BLM regulations are substantially different from those of the Forest Service, and the court precedents applying the Forest Service regulations are, accordingly, not particularly germane.

The Forest Service regulations were originally promulgated in 1974. See 39 FR 31317 (Aug. 28, 1974). At that time, there were no similar regulations applicable on land under the jurisdiction of BLM. 25/ Eventually, however, doubtless prodded by the Forest Service's success in enforcing its regulations, BLM published proposed rules to control mining activities on BLM lands. Initially, regulations were proposed on December 6, 1976 (41 FR 53428). These proposed regulations tracked, with minor variations, the Forest Service regulations.

Thus, activities defined as "casual use" did not require any notification. Where, however, "significant disturbance" might be caused, an operator was required to file a "notice of intent." See Proposed 43 CFR 3809.1-1(a), 41 FR 53429. After the filing of the notice of intent, the authorized officer had either 15 working days (if BLM were the surface managing agency) or 30 working days (if the surface was managed by another agency 26/) to notify the operator whether a plan of operations need be submitted. See Proposed 43 CFR

25/ Indeed, the only relevant regulation in existence prior to the adoption of 43 CFR Subpart 3809, applied, by its own terms, solely to claims subject to the Surface Resources Act. See note 5, infra. This lack of a regulatory framework was noted by the court in United States v. Richardson, supra, and led it to conclude that "insofar as BLM lands are involved, any activity is permissible which is directly related to mining or prospecting." Id. at 294.

26/ While it was clear that these regulations did not apply to mining claims located in national parks (see Proposed 43 CFR 3809.0-7(a), 41 FR 53429)), it was unclear whether they applied to claims located in the national forests as an additional requirement to the already issued Forest Service regulations.

3809.1-3, 41 FR 53430. The proposed regulations expressly noted that "no operator shall construct or place any structure on a mining claim without first obtaining an approved Plan of Operations." See Proposed 43 CFR 3809.2-1(c), 41 FR 53430.

The plan of operations required documentation similar to that required under the Forest Service regulations. Compare 36 CFR 228.4(c) with Proposed 43 CFR 3809.2-3, 41 FR 53430. However, the regulations further provided that the authorized officer could, under certain circumstances, order operations suspended (Proposed 43 CFR 3809.4-1, 41 FR 53432) and expressly stated that:

> Mining operations which cause significant disturbance and that are undertaken either before the operator has filed a Notice of Intent and action taken under § 3809.1-3, or if required, without having an approved Plan of Operations or are continued after ordered suspended in accordance with §§ 3809.2-5(b), 3809.2-6(b) and paragraph (d) of this section, will be considered a trespass against the United States. Trespassers will be liable for damages and be subject to prosecution for such unlawful acts. (See 43 CFR Part 9230).

Proposed 43 CFR 3809.4-2(a), 41 FR 53432.

These proposed regulations ultimately generated over 5,000 comments. In light of these comments, major revisions were made in the proposed regulations and the regulatory package was repromulgated as proposed rulemaking. See 45 FR 13956 (Mar. 3, 1980).

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fn. 26 (continued)
See Proposed 43 CFR 3809.0-7(b), 41 FR 53429. This ambiguity was ultimately alleviated in the final regulations, which expressly excluded lands in the national forest system from their purview. 43 CFR 3809.0-5(e).

One substantial modification was the elimination of the notice of intent. The preface of the proposed regulations noted that "[t]he original notice of intent/'significant disturbance' concept has been eliminated and replaced with a new procedure which defines more precisely when a plan of operations is required." 45 FR 13958. Thus, rather than focusing on the foreseeable results of mining as triggering the need to file a plan of operations, the Department proposed regulations which mandated the filing of a plan of operations prior to commencing certain specified activities. See Proposed 43 CFR 3809.1-1, 45 FR 13960. Of particular relevance to the instant case, among the activities expressly enumerated as requiring a plan of operations was "[t]he construction or placing of any mobile, portable or fixed structures on public lands for more than 30 days." See Proposed 43 CFR 3809.1-1(e), 45 FR 13961.

Another important change was proposed with reference to suspension of operations and liability for trespass. Proposed 43 CFR 3809.4-1 and 3809.4-2(a), 41 FR 53432, were deleted in their entirety. As the preface of the 1980 proposed regulations noted "[a]fter further examination of the authority of the Secretary to issue these regulations, it has been decided that the authorized officer will not unilaterally suspend operations without first obtaining a court order enjoining operations which are determined to be in violation of the regulations." 45 FR 13958. Accordingly, 43 CFR 3809.3-2, 45 FR 13964, was proposed to effectuate this intent.

Final regulations were promulgated on November 26, 1980, 45 FR 78902. These regulations, however, differed markedly from both the earlier proposals.

Numerous comments generated by the 1980 proposed rulemaking had questioned whether the Department would be able to meet the deadlines imposed on BLM in approving a plan of operations in view of the great number of such plans which would be submitted. 27/ In light of this concern, the Department sought to revise the regulations so as to greatly reduce the number of plans of operation that need be filed by establishing a threshold concept. See 45 FR 78902, 78904. The key element in this threshold was the disturbance of 5 or more acres in any calendar year.

As adopted, the regulations provide that for any activity other than "casual use," 28/ which will cause a cummulative surface disturbance of 5 acres or less during any calendar year, an operator must file a notice for each calendar year, 15 days prior to commencing operations. 29/ See 43 CFR 3809.1-3(a). Unlike the 1976 proposed rules which required BLM approval of a "notice of intent" (see Proposed 43 CFR 3809.1-3, 41 FR 53430), the "notice" provision ultimately adopted expressly provided that "approval of the notice, by the authorized officer, is not required." 43 CFR 3809.1-3(b). See also 45 FR 78904 ("The notice is not subject to approval").

27/ The 1980 proposed regulations had provided a 30-day period for review by the authorized officer with one extension for an additional 60 days available (unless an environmental statement was deemed necessary). In the absence of notification of any deficiency in the plan by the authorized officer, the mining operator could proceed with his or her operations. See generally Proposed 43 CFR 3809.1-4, 45 FR 13961.

28/ "Casual use" is defined as "activities ordinarily resulting in only negligible disturbance of the federal lands and resources." 43 CFR 3809.0-5(b).

29/ It should be noted that for certain classes of land such as areas of critical environmental concern (ACEC's), or where the land had been withdrawn, a plan of operations rather than a "notice" would be required. See 43 CFR 3809.1-4(b). None of these special category lands are involved in the instant appeal.

As explained in the preface to the final regulations, the purpose of requiring a "notice" was to

> give the authorized officer and his/her staff an opportunity to evaluate the proposed operations to determine whether a particular location contains some special resource value that could be avoided by the operation. If special values are discovered, the authorized officer could bring that to the attention of the operator and discuss possible alternatives with the aim of avoiding resource use conflicts. This is an area where cooperation between the Bureau of Land Management and the mining industry will lead to protection of Federal lands from those mining operations that might otherwise inadvertently cause damage to those lands. The location of a route of access is an example of the type of matters that might be discussed during the 15-day period. The authorized officer might have information as to special resource values in an area the route of access is to cross. If a slight change in the route of access would preserve the special value, the authorized officer and the mining operator could reach an agreement to make such a change.

45 FR 78905-78906.

While certain specified changes were made in the content of and procedures for processing a plan of operations, 30/ most of these modifications are not of particular relevance herein. Special note, however, should be taken of two specific provisions. Thus, 43 CFR 3809.2-2 expressly provided that all operations "shall be conducted to prevent unnecessary or undue degradation of the Federal lands." 31/ See also section 302(b) of FLPMA,

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31/For example, the final regulations specified that the Federal Government would pay for the costs of salvage of cultural resources, 43 CFR 3809.1-6(c).

31/ "Unnecessary or undue degradation" is defined as any "surface disturbances greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a nuisance may constitute unnecessary or undue degradation." 43 CFR 3809.0-5(k).

43 U.S.C. § 1732(b) (1982). Of particular importance for the instant appeal, major revisions were also made to 43 CFR 3809.3-2, relating to noncompliance with the applicable regulations.

As adopted, 43 CFR 3809.3-2(a) declares that the "[f]ailure of an operator to file a notice * * * will subject the operator, at the discretion of the authorized officer, to being served a notice of noncompliance or enjoined from the continuation of such operations by a court order until such time as a notice or plan is filed with the authorized officer." It is further provided that "[a]ll operators who conduct operations under a notice * * * on federal lands without taking the actions specified in a notice of noncompliance within the time specified therein may be enjoined by an appropriate court order from continuing such operations and be liable for damages for such unlawful acts." 43 CFR 3809.3-2(c). Finally, it is provided that the "[f]ailure of an operator to take necessary actions on a notice of noncompliance, may constitute justification for requiring the submission of a plan of operations * * * and mandatory bonding for subsequent operations which would otherwise be conducted pursuant to a notice." 43 CFR 3809.3-2(e).

One of the obvious deficiencies of the regulations as adopted is the failure to directly address what circumstances, other than the failure to file a notice, justifies issuance of a notice of noncompliance where the operator clearly is not required to submit a plan of operations. Inferentially, however, 43 CFR 3809.3-2(d) does provide some guidance. That regulation states:

> A notice of noncompliance shall specify in what respects the operator is failing or has failed to comply with the requirements of applicable regulations, and shall specify the actions

> which are in violation of the regulations and the actions which shall be taken to correct the noncompliance and the time, not to exceed 30 days, within which corrective action shall be started.

Thus, it would seem that failure to comply with any applicable regulation would support issuance of a notice of noncompliance.

This interpretation finds additional support and, indeed, some clarification, in the prefatory notes to the regulations. Thus, the Department stated that:

> The Bureau of Land Management will cooperate with an operator to the extent possible in rectifying situations that are causing unnecessary or undue degradation. In extreme cases, where an operator will not cooperate, injunctive procedures can be initiated and a restraining order requested. Failure to comply with an injunction will make an operator subject to such penalty as a court may impose. An important provision added to this section is that all operations fall under the provisions of the noncompliance section whether the operations are (1) casual use, not requiring any notice, (2) below the threshold level, or (3) under plans of operations because in each case they must not cause unnecessary or undue degradation. One comment feared that there would be no "benchmark" for measuring noncompliance and that such determinations may be arbitrary and capricious. For all practical purposes, "the benchmark" will be whether there is unnecessary or undue degradation of Federal lands. All phases of the final rulemaking will be monitored to ensure that all operations are treated equitably. [Emphasis supplied.]

45 FR 78908. Thus, in the absence of a total failure to file a notice of intent 32/ or where the notice does not adequately describe the operations

32/ While the final regulations appear to purposely eschew utilizing the phrase "notice of intent," favoring instead the simple term "notice," the term "notice of intent" will be used in our subsequent discussion to avoid confusion with the "notice of noncompliance."

which will or have occurred or where the activity violates an express regulatory prohibition, the correctness of the notice of noncompliance must be judged on whether or not the activity which it seeks to ameliorate properly constitutes an "unnecessary or undue degradation of Federal lands."

Before analyzing the present regulatory framework in light of the facts of the instant case, it might be useful to contrast the proposed regulations with the adopted regulations insofar as occupancy of a mining claim is concerned. Under the 1976 proposals, it would be necessary to obtain approval of a notice of intent, and, thus, BLM could refuse to approve occupancy absent a showing that it was reasonably incident to mining. Moreover, the regulations clearly required that an operator submit a plan of operations prior to placing any structure on the land. See Proposed 43 CFR 3809.2-1(c), 41 FR 53430. Failure to obtain approval prior to proceeding to occupy the land subjected the operator to trespass damages. See Proposed 43 CFR 3809.4-2(a), 41 FR 53432. Thus, BLM's prior approval was necessary before a claimant could commence occupancy on the claim.

Similarly, the 1980 proposals also expressly required the filing of a plan of operations prior to placing any structures on public lands for more than 30 days. See Proposed 43 CFR 3809.1-1(e), 45 FR 13961. Thus, under either proposed regulatory scheme the initiation of occupancy prior to approval constituted a per se violation of the regulations.

This is not true, however, under the regulations which were actually adopted. Whereas both sets of proposed regulations had effectively provided that intended occupancy of a claim would trigger the need for filing a plan

of operations, the final regulations, as promulgated, contained no such language. Indeed, under the present regulatory scheme there is no necessity that a claimant obtain prior approval of occupancy, though it is contemplated that it will be duly "notice." Occupancy duly "noticed" can be prohibited, if at all, only upon a showing that such occupancy results in an undue or unnecessary degradation.

BLM contends that appellants' occupancy was not duly noticed and that this failure is sufficient to justify issuance of the notice of noncompliance under 43 CFR 3809.3-2(a). Examination of this question requires advertence to two separate temporal components. The first is the alleged failure to file a notice prior to the initiation of any occupancy. Thus, BLM suggests that appellants' initial notice was, itself, merely descriptive of actions already occurring and therefore violative of 43 CFR 3809.1-3(a) which requires that a notice be filed at least 15 calendar days prior to the commencement of any operations.

Even assuming this contention to be factually accurate, however, we do not believe that, given the facts of thus case, appellants' failure to timely notify BLM would justify the instant notice of noncompliance. The regulation, 43 CFR 3809.3-2(a), provides that failure to file a notice will subject the operator "at the discretion of the authorized officer" to being issued a notice of noncompliance. The record indicates that appellants may well have commenced occupancy prior to their initial notice. The authorized officer, though clearly aware of this problem, 33/ apparently chose not to issue the

33/ See memorandum of Feb. 3, 1983, by Eric Schoblom to file.

notice of noncompliance at that time. Eventually, at BLM's prodding, appellants submitted their original notice. If BLM desired to issue a notice of noncompliance for the initial occupancy, it should have done so no later than the receipt by the District Manager of appellants' 1982 notice on May 18, 1982. Rather than at that time issuing a notice of noncompliance, the District Manager informed appellants that their notice was "in order and complete." Thus, even assuming there was an initial failure to comply with 43 CFR 3809.1-3(a), which could have subjected appellants to the issuance of a notice of noncompliance, we hold that the authorized officer waived his right to complain of such infraction. 34/

There is a second element which must be reviewed, however, regarding the applicability of 43 CFR 3809.3-2(a). This relates to the construction of the cabin. Viewing their 1982 notice in the light most favorable to appellants, one could not conclude that they intended to construct a log cabin on the Valentine claim. While they originally asserted that they obtained oral approval to erect the cabin, on appeal they simply argue they did not understand that they needed to file a new notice of intent. Simple ignorance of the law, however, has never excused a failure to comply therewith. See generally Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Thus, appellants' failure to file another notice or an amendment of their earlier notice prior to placing the cabin on the land would support the issuance of the January 10, 1983, notice of noncompliance under 43 CFR 3809.3-2(a).

34/ To hold otherwise would subject all claimants who may have initially violated the regulations, but subsequently attempted to comport themselves thereto, to the possibility that, at some indefinite time in the future, they might be subject to a notice of noncompliance for this initial failure.

An individual who is not required to file a plan of operations violates 43 CFR 3809.3-2(a) only by failing to file a notice of intent. This deficiency is properly remedied by the filing of such notice. Upon such a filing, the operator has necessarily remedied the deficiency which gave rise to the notice of noncompliance and met all regulatory requirements under 43 CFR 3809.1-3. While we recognize the regulations provide that failure to comply with a notice of noncompliance may permit BLM to require the filing of a plan of operations (43 CFR 3809.3-2(e)), the question presented is whether BLM may, in a notice of noncompliance based on the failure to file a notice of intent, require removal of structures not properly "noticed." We think not. 35/

The major error in BLM's position is its assumption that had appellants timely filed a notice of intent BLM could have disapproved it. This is simply not true. The regulations and their preamble quite clearly underline the fact that BLM does not approve a notice. See 43 CFR 3809.1-3(b); 45 FR 78904 (November 26, 1980). It seems elementary that what BLM cannot approve, neither can it disapprove. Indeed, BLM's assertion of the right to disapprove a notice of intent would undermine the entire theoretical basis for the adoption of the threshold concept as discussed infra, since the whole purpose of the threshold approach was to limit the number of plans which would be subject to BLM's prior approval.

Had appellants duly noticed their intent to erect the cabin on their claim, BLM could have advised them of its objections and attempted to reach

35/ We wish to emphasize that our discussion on this point is strictly limited to the permissible scope of remedies which can be ordered under subsection (a). BLM's authority to direct actions under 43 CFR 3809.3-2(d) is considerably broader and is discussed later in the text.

an agreement. However, if appellants had insisted on constructing their cabin, BLM could not have, consistent with the present regulations, refused its consent and thereby have prevented them from proceeding. On the contrary, the regulations provide that BLM's approval "is not required." See 43 CFR 3809.1-3(b). Appellants could proceed in the face of BLM's objections and not violate any element of the noticing regulations.

[5] BLM is not, however, totally powerless, though its authority under the present regulation scheme is reactive rather than anticipatory. BLM could well assert that the placement of the cabin on the claim constituted "unnecessary or undue degradation" and issue a notice of noncompliance on that ground. BLM's actions, however, would be based not in 43 CFR 3809.3-2(a) for a violation of 43 CFR 3809.1-3(a), but would arise under 43 CFR 3809.2-2 and 43 CFR 3809.3-2(d). We examine BLM's authority under 43 CFR 3809.3-2(d) below. Suffice it at this point to hold that, in the absence of a regulation giving BLM authority to approve or disapprove a notice of intent, a notice of noncompliance issued under 43 CFR 3809.3-2(a) for failure to timely file a notice of intent is remedied by the filing of the notice as required 43 CFR 3809.1-3(a). 36/

36/ We do not wish to intimate that the Board views this procedure as the best way to handle placement of structures on BLM lands. Certainly, it would seem to make more sense from the point of view of both BLM and the operator to determine, before the fact, whether or not a specific structure is permissible. Either of the two sets of proposed regulations would have accomplished this result. Whether a hearing would have been needed in order to refuse permission to occupy a claim under either of these proposals we need not now decide. The regulations, as adopted, failed to make similar provision for prior approval.

We are forced to deal with the regulations as we find them, not as we would have written them. If it was BLM's intent to require its approval prior to the establishment of residency on mining claims, BLM need only amend its regulations so that they reflect such an intent.

Nothing in the district court's decision in Bales v. Ruch, 522 F. Supp. 150 (E.D. Cal. 1981) compels a contrary result. Bales involved cross-motions for injunctive relief by certain mining claimants and BLM. The mining claimants in that case occupied a placer claim, fenced off the road leading to the claim, posted "no trespassing" signs, and discharged waste water thereon. Claimants filed no notice of intent whatsoever, asserting that their occupancy was "casual use."

In granting the Government's motion for a preliminary injunction to preclude further occupancy, the court correctly noted that the activities of the claimants could, in no wise, be considered as "casual use." While recognizing that the claimants had attached a "notice" to their Opposition to Defendants' Motion, the court rejected this document since "none of these documents are sufficient to give the kind of notice required to enable the BLM to pursue its mandate to manage and protect surface resources on federally owned lands." Id. at 156-57. The court ultimately concluded that "in light of [claimants'] complete failure to even attempt to meet the requirements of the federal government with regard to mining claimants, their adamant refusal to attempt to remedy violations of State and County health laws, and their serious overuse of the surface resources under the guise of mining activity which is, at best, minimal, it is clear that [the United States] has more than a probable chance of success when this matter is finally adjudicated." Id.

In the instant case, appellants did, if belatedly, file notices of intent. Moreover, their initial notice, when filed, was more than adequate to alert BLM to the uses intended. Thus, one would logically expect that "a

chicken house," which was noticed in appellants' original filing, was for the purpose of housing chickens, and it is therefore hard to credit BLM's surprise that chickens were found on the claim. The original notice also referred to "3 trailer houses," a reference which was, we believe, more than sufficient to convey to BLM appellants' intent to reside on the claim. In fact, the record is abundantly clear that the District Manager did not object to all occupancy on the claim but rather to the form that the occupancy took. See Memorandum from Acting District Manager, Medford, to State Director, dated February 28, 1983. The assertion on appeal that the order of noncompliance "is based upon a conclusion that the Crawfords are occupying the mining claims for the purpose of having a residence, rather than for mining purposes," simply cannot be supported on the present record. The adamant refusal of the claimant in Bales to attempt to follow the regulations finds no real parallel in the instant case. 37/

Independent of the question of compliance with 43 CFR 3809.1-3(a), however, is the issue whether appellants' activities in placing the structures on the claims constitute "unnecessary or undue degradation" in violation of 43 CFR 3809.2-2. Initially, we must point out, there is some confusion in the record over whether or not such a finding served as a predicate to the decision below.

The notice of noncompliance issued by the District Manager had alleged that appellants were causing undue and unnecessary degradation. No such

37/ The issue of compliance with State and local health and environmental protection laws is discussed infra.

conclusion appears in the decision of the State Director, which was totally premised on the failure of appellants to timely file the notice of intent and therefore did not examine whether or not the actions of appellants unduly or unnecessarily degraded the Federal lands. This confusion is exacerbated by the brief filed on behalf of BLM which addresses, at considerable length, the argument that appellants' activities did constitute "unnecessary or undue degradation." See Answer at 2-3, 5-7. 38/ But, while there is some ambiguity over whether or not the decision of the State Director was premised on a finding of "unnecessary or undue degradation," it clearly served as a predicate for the actions of the District Manager in issuing the notice of noncompliance, and is, thus, properly considered by the Board.

It is important to recognize that while the concept of "unnecessary and undue degradation" is related to the "reasonably incident" standard, it is somewhat broader in scope. As an example, tailings from a mining claim are often deposited in proximity to the mining area. Use of land for this purpose would, of course, be a use "reasonably incident" to mining. But there might be a number of areas where tailing disposal is feasible. A mining claimant might opt to utilize one specific site to the exclusion of others because of its relative ease of access. The selected site, however, may have impacts on other land values which would not occur were alternate sites utilized. In such a case, it might well be determined that the use of the specific area for tailings disposal resulted in "unnecessary or undue degradation" even though the use was "reasonably incident" to mining.

38/ While appellants' Statement of Reasons is directed primarily to the "reasonably incident" standard, it, too, briefly discusses the question of degradation. See Statement of Reasons at 11; Exh. A at 3.

The key distinction to keep in mind is that the "reasonably incident" standard resolves questions as to the permissibility of a use by determining whether or not the use is reasonably incident to the mining activities actually occurring. The "unnecessary or undue degradation" standard comes into play only upon a determination that degradation is occurring. Upon such an initial determination, the inquiry then becomes one of determining whether the degradation occurring is unnecessary or undue assuming the validity of the use which is causing the impact. For, if the use is, itself, not allowable, it is irrelevant whether or not any adverse impact is occurring since that use may be independently prohibited as not reasonably incident to mining. 39/

Thus, the allegation that appellants' occupancy was causing unnecessary or undue degradation must be premised on the impacts of that occupancy and not on the legitimacy of all occupancy. 40/ Indeed, the regulatory definition supports this analysis since it defines "unnecessary or undue degradation" as "surface disturbance greater than what would normally result when

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9/ Nothing in the above discussion undermines our earlier conclusion that the "reasonably incident" standard always subsumed the authority to examine the mode of mining to determine its reasonableness. Thus, the "reasonably incident" standard inquires into the types of activities occurring to determine whether they can be reasonably related to the development of the mineral deposit which has been discovered, whereas the "unnecessary or undue degradation" standard examines the impacts of the mining and associated activities on the other surface values to determine whether possible adverse impacts can be ameliorated, and, if so, whether the failure to ameliorate has resulted in unnecessary or undue degradation. With respect to the instant case it would be possible to conclude that occupancy was reasonably incident to mining but that the form or situs of the occupancy resulted in unnecessary degradation.

40/ Congress, in promulgating section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1982), clearly implied that the grant of authority to the Secretary to prevent unnecessary or undue degradation was an amendment to the mining laws. If this were true, it would raise the ancillary question whether a valid claim in existence on October 21, 1976, was subject to this provision.

an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character." 43 CFR 3809.0-5(k). This definition clearly presumes the validity of the activity but asserts that it results in greater impacts than would be necessary if it were prudently accomplished.

Examining the facts of the instant case with this distinction in mind, it is immediately apparent there is a demonstrable conflict between the position of the District Manager and that subsequently taken by BLM in its responsive brief. The District Manager clearly objected to the type of occupancy, rather than occupancy per se, while BLM now asserts that all occupancy should be prohibited. BLM's argument actually goes not to the question of unnecessary or undue degradation but to whether occupancy is reasonably incident to the mining activities actually occurring. We have examined this matter above and will not repeat our discussion here, except to reiterate our view that, where mining is occurring, a BLM determination that occupancy is not reasonably incident to mining activities and must cease cannot be sustained unless the claimant has been first afforded notice and an opportunity for a hearing.

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fn. 40 (continued)
See, e.g., California Portland Cement Corp., 83 IBLA 11 (1984). Moreover, if this language were treated as an amendment of 30 U.S.C. § 26 (1982), we would be faced with the anomalous result that Congress has amended the mining laws only to the extent they apply to lands administered by the Secretary of the Interior, as section 302 of FLPMA does not apply to Forest Service lands.

However, since the claims in the instant case were located after the passage of FLPMA, they are clearly subject to its provisions. Therefore, we expressly decline to decide whether the last sentence of section 302(b) did, in fact, constitute a change in the mining laws and, if so, to what extent it is applicable to valid claims then in existence.

The District Manager, however, did challenge the mode of occupancy, rather than occupancy per se. The problem, however, is that he never focused on how the impacts of the log cabin differed from the impacts of the three trailers to which he, apparently, did not object. We note that BLM has suggested that "it is apparent that when public land is used exclusively by an alleged mining claimant or operator the practical effect is to limit the use of that land for other purposes, including recreational use by members of the public" (Answer at 3). While this may be true, we fail to see how it advances resolution of the instant case. As has been noted, "If all the competing demands reflected in FLPMA were focused on one particular piece of public land, in many instances only one set of demands could be satisfied." Utah v. Andrus, 486 F. Supp. 995, 1003 (D. Utah 1979).

Multiple use does not mean that every acre of Federal land must be amenable to every possible use at any given moment. Indeed, that is an impossibility. 41/ Nor does the fact that one use necessarily prevents use of the same land for other purposes establish that degradation, much less unnecessary or undue degradation, has occurred. Rather, the focus must be on how the specific use impacts on other uses to a degree greater than would result were ordinary prudence and care exercised. The present record is inadequate to show how occupancy in a cabin has an intrinsically greater

41/ We note that the synopsis of the case record, prepared by BLM, states that:

"The existence of the cabin and other items prevents the BLM from managing the surface of the earth that is occupied by the cabin." While this is, of course, factually true, it shows, in our view, a fundamental misconception of multiple use management as explained in the text.

impact than occupancy in three trailers, or how appellants' specific occupancy has adversely impacted upon the land to an extent greater than would be expected from the occupancy of a "prudent operator."

The record does raise substantial questions, however, as to the necessity for multiple trailers, the need for maintaining chickens and the justification for occupancy on a year-round basis given the fact that mining is limited to a 5-month period. While we recognize situations may occur where a use, arguably ancillary to occupancy, is so egregious as to warrant a declaration that, on its face, its impacts cannot be justified, there exist sufficient questions on the present record to dissuade us from entering such a declaration herein. However, should the authorized officer decide to initiate a contest challenging any occupancy of the claim as not reasonably incident to mining it would, at that time, be proper to examine the nature and extent of appellants' mining activities and prescribe appropriate limits to their occupancy, even if some occupancy could be found justifiable as reasonably incident to their mining.

[6] Occupancy and the failure to timely "notice" it, however, were not the sole bases upon which the State Director affirmed the issuance of the notice of noncompliance. The State Director also concluded that appellants had failed to obtain necessary state permits. We will now examine this question.

There is no question that the failure of an operator to obtain any necessary state permits would serve as an adequate justification for issuance

of a notice of noncompliance. The State Director's decision, however, did not determine that various permits were necessary but merely held that "one or more permits may be required" (Decision at 4). The State Director then listed four permits embracing various aspects of placer mining operations which might be required. The problem is that the decision never identified which ones were, in fact, required.

Indeed, one of the permits cited by the State Director was a "Fill-Removal Permit" which is issued by the State Lands Division where it is anticipated that more than 50 cubic yards of material within the bed of a natural waterway will be moved. Yet, a memorandum to the file, dated April 5, 1983, indicated that 50 cubic yards of material had not been moved on the claims, and thus it would seem that the BLM case file contradicted the assertion that this permit might be needed.

In any event, the mere recitation of permits that might be required is an insufficient basis upon which to support issuance of a notice of noncompliance. Such notice is only properly issued where the authorized officer finds, as a fact, that specific permits are required and have not been obtained.

The present record displays the type of confusion generated when a decision is premised on the possibility of a violation. Thus, appellants asserted in their appeal to the State Director that "a second check with the issuing state agencies showed that none of these permits were required for our operation to date." Beyond this assertion, however, appellants submitted

no proof these permits were not needed. The record is as devoid of documentation showing that none of these permits were required as it is lacking in factual allegations that any particular permit was required.

On appeal, appellants assert they have now applied for all of the permits mentioned and "have either received approval or have been told that permits are about to be issued, or that no permit is needed" (Statement of Reasons, Exh. A at 5). While we realize that ultimate compliance need not necessarily vitiate an earlier failure to comply, we also note the State Director concluded that "it is difficult to ascertain from the case record which, if any, state permits were required for appellants' operations on the date at issue, i.e., January 10, 1983" (Dec. at 4). In view of the impossibility of ascertaining whether or not, as of January 10, 1983, appellants were in violation of any state permitting requirements, and in light of their uncontradicted assertions that they have obtained or are in the process of acquiring any that may be needed, we will set aside the notice of noncompliance to the extent it was premised on the failure to timely obtain state permits. In the future, we would expect that a decision alleging lack of compliance with state permitting requirements would clearly delineate the permits needed, and clearly describe the basis for BLM's conclusion that they were required.

In summary, where mining is occurring and the Government seeks to challenge occupancy as not reasonably incident to such mining activities, the Government must provide notice and an opportunity for hearing prior to ordering the cessation of occupancy. Moreover, since BLM can neither approve nor

disapprove a notice of intent under the present regulatory scheme, the failure to timely file such a notice with BLM, where this failure is subsequently remedied, does not, without more, support issuance of an order to cease all occupancy. Finally, a BLM challenge that occupancy of the claim is causing unnecessary or undue degradation is premised not on a challenge that all occupancy should be prohibited but rather is based on the conclusion that the impacts of the specific occupancy complained of unnecessarily or unduly affect other surface resources. If, upon consideration of the foregoing, BLM desires to challenge appellants' occupancy as not reasonably related to their mining activities or the specific occupancy as resulting in unnecessary or undue degradation, it shall bring a contest alleging such grounds.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case files remanded for further action not inconsistent with the views expressed herein.

James L. Burski
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge.